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January 9, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments of One Call Communications, Inc. on
Policies and Rules Concerning Unauthorized Changes of
Consumers' Long Distance Carriers, Docket No. 94-129

Dear Mr. Caton:

Enclosed are one original and nine copies of One Call Communications, Inc.'s
Comments in the above docket proceeding.

Please date stamp and return the enclosed duplicate copy of this letter as
acknowledgment of its receipt.

Sincerely,

Randall B. Lowe
for Randall B. Lowe

Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)

Policies and Rules Concerning)

Unauthorized Changes of Consumers')

Long Distance Carriers)

CC Docket No. 94-129

DOCKET FILE COPY ORIGINAL

Comments of One Call Communications, Inc.

Randall B. Lowe
Piper and Marbury
1200 Nineteenth Street, N.W.
Washington, D.C. 20036-2430
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Dated: January 9, 1995

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Summary of Comments

One Call believes that the Commission's Notice of Proposed Rule Making ("NPRM") in this matter is unnecessary, overly restrictive and anticompetitive. In short, the concerns that resulted in the Commission's NPRM do not warrant changes to the Primary Interexchange Carrier ("PIC") change rules.

One Call believes that (i) additional Letter of Agency ("LOA") content requirements are not egregious so long as the Commission does not prescribe specific LOA language and permits interexchange carriers ("IXCs") to independently implement the suggested guidelines; (ii) the Commission should not regulate the form of LOAs because IXCs should have the discretion to market their services in any manner that is not false or misleading and therefore IXCs should have control over the use of inducement-oriented LOAs, the use of other carrier names and foreign language LOAs; (iii) there is no need to promulgate different rules for business LOAs; (iv) customers incorrectly PIC'd should be liable for the charges they would have paid if their PIC had never been changed, and (v) the Commission's telemarketing PIC change rules should not apply to customer-initiated calls to an IXC's 800 number.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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Unauthorized Changes of Consumers')	
Long Distance Carriers)	

Comments of One Call Communications, Inc.

One Call Communications, Inc. ("One Call")¹ is an interexchange carrier ("IXC") providing tariffed intrastate, interstate and international 1+ and 0+ services throughout the United States. One Call hereby files these Comments in accordance with the Commission's Notice of Proposed Rule Making ("NPRM") in the above-captioned matter.²

I. Introduction

The Commission, "on its own motion," initiated this rule making proceeding to review its policies and to propose rules regarding unauthorized Primary Interexchange Carrier ("PIC") changes. Specifically, the Commission has sought comment on proposed rules regarding Letters

¹One Call is headquartered in Carmel, Indiana.

²Adopted and released on November 10, 1994.

of Agency ("LOAs") as a result of "1,700 complaints during Fiscal Year 1993" and "nearly 2,500 such complaints during Fiscal Year 1994"³ alleging unauthorized PIC changes. In comparison with the amount of PIC changes executed each year, however, the Commission has not established a "PIC change problem"⁴ which justifies widening the existing net of regulation. Indeed, the fact that the amount of complaints in comparison to the amount of PIC changes is so low is evidence that the current rules are serving their purpose.⁵ Any attempt to "fix" a nonexistent or insignificant problem by creating more regulations is an intrusive and unnecessary exercise of regulatory authority⁶ and a waste of precious public and private sector resources that could be put to better use.⁷

³NPRM at para. 1.

⁴Even if a minor problem exists, it is insignificant in comparison with the number of PIC changes that are executed every year. For instance, assuming that there were only one million PIC change orders executed by IXC's for fiscal year 1994, 2,500 complaints amount to a mere 0.25% of the one million total PIC change orders. Moreover, according to the Commission's Industry Analysis Division, as of June 1994, there were 444 IXC's operating in the United States. On average, this calculates to approximately 6 or 7 complaints per IXC filed at the Commission with respect to PIC changes during Fiscal Year 1994.

⁵See e.g., *In the Matter of Policies and Rules Concerning Changing Long Distance Carriers*, CC Dkt. No. 91-64, *Report and Order*, 7 FCC Rcd 1038 (1992) ("PIC Verification Order"), *recon. denied*, 8 FCC Rcd 3215 (1993); in particular, a Separate Statement by Commissioner Barrett to the PIC Verification Order which states in part:

I believe this Order did a good job in balancing legitimate customer concerns against the objective of allowing greater and easier customer choices of long distance providers. I believe that these revisions to our current procedures will provide additional protection to consumers beyond existing safeguards without unreasonably burdening competition in the interexchange market.

⁶On November 8, 1994, the American public voted for change. A new national agenda is in place. The most prominent issue during the campaigns of 1994 was the issue of government size and its intrusiveness into public life. In fact, the historic "Contract With America" mandated the "end of government that is too big, too intrusive, and too easy with the public's

(Footnote continued to next page)

The proposed rules will not rid the industry of bad actors. To the contrary, they will penalize every law-abiding IXC and overextend the Commission's jurisdictional mandate, *i.e.*, problems of consumer fraud and deceptive advertising are problems for which the Federal Trade Commission ("FTC"), among other organizations, was created to address. Even if the subject matter is within the Commission's jurisdiction, the Commission should not attempt to promulgate regulations to prevent every occurrence of deception and fraud with respect to all IXC services.

The proposed new rules are also anti-competitive. Among other detrimental anti-competitive effects, they will unduly burden small IXCs by disproportionately raising their administrative costs and by unreasonably restricting their ability to use marketing inducements to attract customers from larger and more dominant IXCs. For smaller IXCs, unlike large IXCs, increases in overhead costs cannot be allocated over several profit centers and must be passed directly to customers which, in turn, makes small IXCs less price competitive with large IXCs. Moreover, by proposing to restrict the use of marketing inducements to "generic flavors," the Commission is further unduly restricting the ability of small IXCs to differentiate themselves from their larger competitors. Inducements are an essential and legitimate marketing strategy used by small IXCs to attract new customers. In sum, the anti-competitive effects of the proposed new rules will disproportionately harm small IXCs and chill their innovative entrepreneurship which is essential to the very health and growth of the telecommunications industry.

(Footnote continued from previous page)

money." The proposed rules do not satisfy the public's demand for a significant reduction of government intervention in their economic and personal lives.

⁷As stated by Margaret Thatcher, "more regulation means higher costs, less competitiveness, fewer jobs and thus less wealth to raise the real quality of life in the long run." Margaret Thatcher, *Downing Street Years* at 672 (1993).

The NPRM implies that the American consumer is uninformed and incapable of making a rational decision. Consumers have become much more sophisticated telecommunications users since divestiture. They can and do make informed choices. Even so, more than adequate state and federal consumer protection laws exist to protect consumers. The FTC provides federal protections against "unfair and deceptive acts or practices."⁸ All fifty states and the District of Columbia have their own laws based on the FTC's regulations against deceptive and unfair trade practices. These statutes provide a forum and relief for consumers who file complaints regarding false or deceptive advertisements. Determining whether or not an IXC's marketing inducements are deceptive, misleading, or fraudulent is not within the purview of the Commission's primary competence and nor should it be.⁹

Valid LOAs are a function of clarity. As long as the LOA contains the clear and unambiguous content requirements suggested by the Commission, the LOA should be found legitimate, regardless of the form of inducement or language used to attract customers to an IXC's services.

⁸The Federal Trade Commission Act ("Act"), 15 U.S.C. §§ 41 *et seq.* was enacted in 1914. The 1938 Wheeler-Lea Amendments to the Act, 15 U.S.C. §§ 41-58 gives the FTC the authority to prohibit unfair or deceptive trade practices.

⁹The Telephone Disclosure and Dispute Resolution Act of 1992, 102 P.L. 556; 106 Stat. 4181 (1992), expressly recognizes that marketing and advertising problems are beyond the scope of the Commission's competence and explicitly mandates the FTC to prescribe rules to "prohibit unfair and deceptive acts in any advertisement for pay-per-call services." *Id.* at § 201. If a consumer purchases a detergent that is advertised to remove all types of stains, but in actuality harms the fabric of washed clothes, should the Environmental Protection Agency attempt to craft new regulations for detergents or should this problem be addressed by existing Federal Trade Commission regulations specifically addressing consumer fraud and deception? Clearly, by virtue of the NPRM, the Commission has elected the former approach.

II. Discussion

A. Rules Regarding the Form and Content of LOAs

1. The Language Required in LOAs

The Commission proposes that all LOAs contain specific prescribed language.¹⁰ In support of this proposal, the Commission cites consumer confusion.¹¹ However, mandating specific legalistic language is unnecessary and will inhibit consumers from making the decision to change IXC.

Prescribing specific LOA language hurts competition. IXCs should be permitted to satisfy the LOA content requirement in a manner that can be tailored to a particular a class of customers and to a particular market and product. Moreover, consumers will tend not to make a change of IXCs if they feel threatened by the LOA's formality. Thus, IXCs should be permitted to choose the language of their LOAs provided that they convey, in clear and conspicuous terms, the LOA content requirements mandated by the Commission.¹²

¹⁰NPRM at para. 10.

¹¹*Id.* at paras. 1 and 7.

¹²The Commission's LOA requirements should be applied nationwide and the individual states should not be allowed to impose their own LOA requirements in addition to those of the Commission.

2. The Form of LOAs

a. IXC's Should Have the Discretion to Market Their Services in any Manner Which is Not False or Misleading

(1) Inducements

The Commission proposes to physically separate the LOA document from marketing inducement materials.¹³ In addition, the Commission seeks comments on whether inducements should be prohibited altogether and, if not, whether inducements should be prohibited from being mailed in the same envelope as the LOA.¹⁴ The Commission is concerned that inducement-oriented LOAs mislead consumers with respect to the nature and effect of LOAs. Specifically, the Commission is concerned with a variety of LOA "form" issues, including the use of an LOA that is in the form of a check, prize claim form, contest entry form, *etc.* and which authorizes a PIC change when the consumer signs it.¹⁵

Requiring that all LOAs be on a separate piece of paper from the inducement will result in substantially increased costs to IXCs, especially to smaller IXCs. These costs will inevitably be passed down to the consumer by way of more expensive long distance charges or will force a curtailment to activities for developing new services.

Inducements are especially important to small IXCs who must overcome significant marketing obstacles, *e.g.*, brand name association, to attract customers. Today, with the increased number of competitors in the long distance marketplace, inducements are an even more vital and necessary marketing device than they were when the PIC change rules were originally

¹³*Id.* at para. 11.

¹⁴*Id.* at para. 12.

¹⁵*Id.* at paras. 6 and 11.

promulgated. Small IXCs must constantly offer their customers a new variety of innovative service packages to stay competitive. Any prohibition on the manner in which an IXC can present the attractiveness of its service, provided that such offerings are not deceptive or fraudulent, will be detrimental to the marketing strategies of small IXCs and, in addition, raise the specter of impermissible censorship and restrictions on commercial free speech.

Consumers have a protected First Amendment interest in the free flow of commercial information that is not false or misleading and concerns a legal activity.¹⁶ Any regulation of protected commercial speech¹⁷ will fail, even if it advances a government interest, if it places an unnecessary burden on the advertiser's ability to communicate its commercial message.¹⁸ If the Commission insists on controlling the form of long distance service advertisements and the information conveyed therein, as suggested in the NPRM, it takes on a censorship role which is contrary to the role of government with respect to commercial speech envisioned by the Supreme Court:

¹⁶See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976). In *Virginia State Board*, a consumer group claimed that the First Amendment barred a statute making illegal the advertisement of prescription drug prices. The Supreme Court agreed, maintaining that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid [advertisement]." See also, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), *rehearing denied*, 414 U.S. 881 (1973).

¹⁷Commercial speech may be defined as speech that advertises a product or service for economic gain.

¹⁸See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) where the Supreme Court struck down a federal statute that prohibited unsolicited mailing of birth control advertisements. The Court found that the government's interest in aiding parental efforts to educate their own children as to contraceptive methods was not directly and narrowly promoted by the federal statute. See also, *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

[A]ssume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.¹⁹

When communications channels are truly open, carriers can market their services, contrasting their own benefits against those of their competitors. The choice among the various alternatives is for the consumer, not the Commission to make. As the Supreme Court has stated, "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse, if it is freely available, that the First Amendment makes for us."²⁰

In its PIC Verification Order, the Commission attempts to balance the need to protect consumers with the goal of encouraging long distance carriers to compete for customers' business.²¹ The Commission explicitly declined to regulate the form of the LOA, preferring to regulate only the content "in order to allow IXC's flexibility in their business operations while providing consumers protection against unauthorized PIC changes."²² The Commission determined that IXC's should be permitted to market their services in any fashion they choose, naming whatever carriers they chose, in whatever language they chose, so long as the LOA was not false or misleading. Other than 1,700 complaints in Fiscal Year 1993 and 2,500 complaints in Fiscal Year 1994, nothing has changed since that determination. IXC's should continue to have such marketing discretion and control over the form of LOAs provided they are neither fraudulent nor deceptive.

¹⁹*Virginia State Board* at 1829.

²⁰*Id.*

²¹*See generally*, PIC Verification Order.

²²*Id.* at 3219.

Inducement-oriented marketing is not a medium indigenous to the long distance PIC change process. Inducements are frequently used to sell a variety of products that are completely separate from the inducement used to market them. For example, consumers have continually been enticed into buying magazines by envelopes exclaiming that "you might be a winner" upon entering a sweepstakes to win prizes and money. This method of marketing is perfectly legitimate and understood by consumers. Indeed, Publishers Clearing House was recently vindicated in a challenge to the manner in which it induces consumers, by its sweepstakes, to solicit magazine sales.²³ In that matter, the U.S. District Court for the Eastern District of California maintained that the FTC's standard of the "reasonable consumer," rather than the "unwary consumer," was the correct standard to apply to test a complaint alleging false or misleading advertisements.²⁴ When advertisements are sent to consumers via a mass mailing, and not to a group of "particularly susceptible and naive" consumers, "a reasonable person may expect others to behave reasonably as well."²⁵

²³*Haskell v. Time, Inc.*, 857 F. Supp. 1392 (E.D. Cal. 1994). The Court found that the alleged misrepresentations, including, exaggerations of the recipients chances of winning or implication that he or she has already won, exaggerations of the amount and value of the prizes, use of enticing photographs of the lifestyles available to the winner, and statements allegedly creating a false sense of urgency regarding the time for reply, were not misleading. Even when sweepstakes rules appeared in smaller type than the words used in the advertisement, they were found to not be illegible or misleading. *Id.* at 1400-1403.

²⁴*Id.* at 1398. The court maintained that the "reasonable person" standard is the "common standard in the law" and is the standard used by the FTC to determine whether a practice is false or misleading pursuant to 15 U.S.C. § 45(a)(1).

²⁵*Id.* at 1399. See also *Committee on Children's Television, Inc. v. General Goods Corp.*, 673 P.2d 660 (1983) where the Court found an example of "particularly susceptible and naive" consumers to be preschool children. See also *Ford Dealers Ass'n v. Department of Motor Vehicles*, 650 P.2d 328 341 (1982).

The reasonable consumer knows that the mass mailings sent by IXC's are part of an advertising campaign, regardless of whether they include a contest, check or prize as an inducement. When a consumer gets a packet in the mail advertising a new long distance service which includes a check payable to the consumer that serves as an LOA (if he or she decides to change IXC's and cashes the check), the reasonable consumer understands that cashing the check will switch his or her IXC. In other words, consumers would not expect an IXC to send a check without "strings attached."²⁶

(2) Name Restrictions

The Commission suggests that LOAs name only the IXC actually setting the rates for the service provided.²⁷ Consumers should always be provided with the name of the IXC offering the service, however, restricting the LOA to the name of only the IXC providing transport will restrict the formation of valid and necessary joint marketing efforts, *e.g.*, an alliance between a billing carrier and an IXC providing the underlying transmission services.

(3) Bilingual or Non-English LOAs

The Commission seeks comment on whether it should adopt rules to govern the form of bilingual or non-English LOAs.²⁸ An IXC should be allowed to publish an LOA in any language it chooses provided that LOA conforms with the Commission's LOA content requirements in a manner that is clear and unambiguous and not false or misleading. It is not reasonable to assume that a consumer will authorize a PIC change if he or she cannot understand

²⁶*See, e.g.*, Edmund L. Andrews, "Telephone Price War Heats Up," *The New York Times* at 39.

²⁷NPRM at para. 14.

²⁸*Id.* at para. 18.

what they are doing. Again, the standard that should underlie any analysis of PIC changes is that consumers are reasonable and make informed choices absent fraudulent activity.

B. Other Unauthorized Conversion Issues

1. Treatment of Residential and Business Customers

The Commission seeks comment on whether business and residential customers should be treated differently with respect to the current LOA requirements.²⁹ Specifically, the Commission is concerned that LOAs are being executed by employees with no authority to do so.³⁰

Additional rules regarding business LOAs are not necessary and may be confusing. An IXC should be permitted to rely on a person who holds him or herself out as authorized to institute a PIC change. Stated differently, if an employee maintains to an IXC that he or she has the authority to make a PIC change for his or her company, the IXC should be able to rely on that assertion. Otherwise, the IXC would become engaged in a policing activity that more properly belongs to employers. In other words, unauthorized acts by employees are a labor issue not a communications matter.

2. Adjustments for Long Distance Charges for Consumers Incorrectly Changed

The Commission seeks comment on whether any adjustments for long distance charges should be made for consumers who are incorrectly changed.³¹ Specifically, the Commission seeks comment on whether consumers should be liable for: (i) the total billed amount from the

²⁹*Id.* at para. 15.

³⁰*Id.*

³¹*Id.* at para. 17.

unauthorized IXC; (ii) the amount consumers would have paid if their PIC were never changed; or (iii) nothing at all.³²

Consumers should be liable for the charges billed to them by the unauthorized IXC to the extent of the amount the consumer would have paid if their PIC was never changed. This requirement would protect a consumer against unanticipated charges but would also prevent the customer from receiving a windfall as a result of the disputed PIC change. It is unfair for a customer who was incorrectly changed to pay the possibly higher charges of a long distance provider he or she did not select. A customer should be responsible only for the long distance charges he or she expected to incur. However, the consumer should not be alleviated of all responsibility for calls and charges he or she knowingly incurred, simply because a PIC change error may have taken place.

3. Use of an IXC's 800 Number

The Commission seeks comment on whether the PIC change protections with respect to telemarketing should be extended to include consumer-initiated inquiries.³³ For instance, if a consumer initiates a call to an IXC's 800 number to receive general information about the IXC's service offerings, and, in the process of that call, the consumer decides to change his or her IXC, the Commission suggests that the telemarketing PIC change procedures should not apply.³⁴ Clearly, the telemarketing PIC change procedures were developed to protect consumers against overly aggressive telephone marketers; they were not designed nor should they be extended to include incoming consumer-initiated inquiries.

³²*Id.*

³³*Id.* at para. 19.

³⁴*Id.*

The offering of an 800 general information number for an IXC is an explicit advertisement to consumers about an IXC's long distance services. Logically, therefore, a consumer initiating a call to an IXC's 800 number is "shopping around" for a new long distance provider. Consequently, it can be assumed that if during the course of an inquiry a consumer chooses to make a PIC change, the consumer did so in an informed and consensual manner.³⁵ The Commission has explicitly stated that "a customer has the option of independently contacting the IXC to make arrangements for long distance service."³⁶

As defined in the Commission's first NPRM with respect to the PIC change issue,³⁷ a "customer-initiated PIC change" is "an order to change a customer's PIC that is generated as a result of a communication to an IC or LEC originated by a customer." The definition does not require that the consumer call the IXC predisposed with the intent to change his or her PIC, merely that the consumer had to initiate a call that resulted in a PIC change. Moreover, IXCs must still obtain LOAs for all PIC changes, including consumer initiated PIC changes, for use in resolving disputes regarding PIC changes. If the IXC does not obtain an LOA, then the IXC is responsible for charges associated with a disputed PIC change.³⁸ Thus, there is no need to extend the telemarketing PIC change procedures to consumer-initiated PIC changes.

³⁵Cf., *In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, 8 FCC Rcd 6885, 6891 (1993) with regard to the assumptions made when a calling party incurs the costs of information conveyed during the course of an 800 telephone call using a credit card.

³⁶*In re Investigation of Access and Divestiture Related Tariffs*, CC Dkt. No. 83-1145, Phase I, 101 FCC 2d 911, 929 (1985) ("Allocation Order"), *recon. denied*, 102 FCC 2d 503 ("Reconsideration Order").

³⁷*In re American Telephone and Telegraph, Petition for Rule Making, Notice of Proposed Rule Making*, 6 FCC Rcd. 1689 (March 14, 1991).

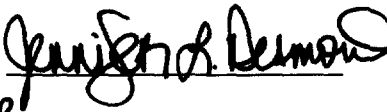
³⁸*See*, PIC Verification Reconsideration Order.


III. Conclusion

The NPRM proposes a significant number of PIC change rules that would unreasonably restrict an IXC's ability to market its services. The existing PIC change rules have worked remarkably well. The proportionally small number of PIC change complaints in relation to the total number PIC changes executed each year indicate that there is no widespread "PIC change problem" that would necessitate the industry-wide PIC change reform as suggested by the Commission. The regulatory hurdles proposed by the Commission will impose unnecessary costs to the PIC change process with little or no apparent benefit to consumers. The proposed new rules are unnecessary, superfluous and anti-competitive. They will reduce economic efficiencies and disproportionately burden smaller IXCs. In sum, the Commission will best achieve the consumer protection objectives that underlie the NPRM by leaving the present PIC change rules unaltered.

Respectfully submitted,

One Call Communications, Inc.

By 

 Randall B. Lowe
Piper & Marbury
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-3900

Dated: January 9, 1995

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments to the Commission's Notice of Proposed Rule Making has been sent by United States first class mail, postage prepaid, or by hand-delivery, this 9th day of January, 1995, to the following:

Formal Complaints Branch
Federal Communications Commission
Enforcement Division
Common Carrier Bureau
Plaza Level
1250 23rd Street, N.W.
Washington, D.C. 20554

International Transcription Services
Room 140
2100 M Street, N.W.
Washington, D.C. 20037

A handwritten signature in cursive script, reading "Simin Barbour". The signature is written in dark ink and is positioned above a horizontal line.

Simin Barbour